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Supreme Court of the United States

OCTOBER 1938 TERM No. 771

UNITED STATES OF AMERICA,
Appellant,

v.

ROCK ROYAL CO-OPERATIVE, INC., et al.,
Appellees.

BRIEF FOR APPELLEE CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC.

LEONARD ACKER,
Counsel for Appellee Central New York Co-operative Association, Inc.

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ROCK ROYAL CO-OPERATIVE, INC., et al.,
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BRIEF FOR APPELLEE CENTRAL NEW YORK CO-OPERATIVE ASSOCIATION, INC.

Statement.

This appellee is a co-operative corporation under the laws of New York, whose members are dairy farmers with farms in New York.[1] It operates four country milk receiving plants. It receives and ships the milk of its members to three business companies, all of whose stock it owns, to be sold in the marketing area on behalf of its members. The milk is sold to retail stores and consumers and the net proceeds distributed pro rata among its members. The co-operative markets milk of some producer patrons on the same basis (R. pp. 265-267).

The net proceeds have exceeded the value of the milk calculated at the uniform prices under the order. For September, 1938, the difference was over $5,000 which the co-operative is holding and would have distributed to its members but for the order (R. p. 267).

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[1] In the Government's brief the term "appellees" from page 41 to the end is used to refer to the appellees other than this appellee.

Summary of Argument.

POINT I. The statute evidences a clear intent that co-operatives are not subject to the making of payments to any equalization fund such as the producer settlement fund of the order and the order properly interpreted does not subject this co-operative to such payments.

The order fairly interpreted carries out the intent of Congress and under its provisions this co-operative is not obligated to make payments to the producer settlement fund.

As to the co-operative being a handler.

POINT II. The provisions of the order in respect of payments to the producer settlement fund deprive the members of this co-operative of their property and deprive the co-operative and its members of the liberty of carrying on a lawful enterprise in the manner they desire, without due process of law in violation of the fifth amendment.

To compel this appellee to make payment to the producer settlement fund would invalidly interfere with the liberty of making lawful contracts between it and its members.

The equalization fund is not a regulation of interstate commerce.

POINT III. The statute invalidly delegates to producers the legislative power of Congress.

POINT IV. The statute invalidly delegates the legislative power of Congress to the Secretary of Agriculture.

POINT V. The statute and the order, by regulating the prices to be paid for an agricultural commodity, regulate a matter of local concern beyond the powers of Congress.

POINT VI. The Secretary of Agriculture improperly permitted co-operatives to vote for their members without first ascertaining their wishes.

NT VII. The statute does not authorize the market ervice provisions of the order.

NT VIII. The order improperly seeks to utilize the ower of Congress to regulate interstate commerce so s to protect an industry in one area of the United States from the competition of the same industry in ther areas of the United States.

NT IX. Equitable relief was properly denied to enorce an order which was prepared by and enacted as result of the efforts of one group of handlers, the ntervening league and bargaining agency, and which rder was designed to give to such handlers advantages ver their competitors including this co-operative. The rder moreover invalidly discriminates in favor of such andlers.

NT X. The order must be deemed never to have beome effective in view of the invalidity of the state rder to which it was intended to be complementary.

POINT I

he statute evidences a clear intent that co-operatives not subject to the making of payments to any alization fund such as the producer settlement fund the order and the order properly interpreted does subject this co-operative to such payments.

he statute evidences a clear intent that co-operatives, as this appellee, which acts as agent for its mems and remits to them the net proceeds of the sales of r milk, are not obligated to make payments to an alization fund, like the producer settlement fund.

ection 8c(5)(A) authorizes an order to classify milk ccord with its utilization and to fix minimum prices each classification to be paid by handlers for milk rchased" from producers or associations of producers. s provision is the basis for the minimum price proons of the order.

Section 8c(5)(Bii) authorizes the payment to all producers and associations of producers of uniform prices for all milk, irrespective of the use made of such milk by the handler to whom it is delivered. This section is the basis for the uniform price provision of the order.

Section 8c(5)(C) provides:

> "In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof."

This section empowers the Secretary to include in the order the producer settlement fund provision, that being the method chosen by him "to the end that the total sums paid by each handler shall equal the value of the milk purchased by" such handler at the minimum prices. Under this authorizing section the equalization pool is to cover the milk "purchased" by any handler. Co-operatives in general operate as this defendant and purchase no milk but act as agents for their members.

The provisions authorizing minimum prices and the equalization fund each cover only milk "purchased" from producers or producer associations evidencing clearly that they are not applicable to co-operatives which do not purchase their members' milk.

The intent that co-operatives were not intended to be necessarily included in any equalization pool but might come within such pool only if they chose to discontinue acting as agent for their members and to purchase their milk in the fashion of a proprietary handler is made even clearer by Section 8c(5)(F), which provides:

> "Nothing contained in this subsection (5) is intended or shall be construed to prevent a coopera-

tive marketing association qualified under the provisions of sections 451 to 457 of this title, known as the 'Capper-Volstead Act', engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk."

This section carefully differentiates between the purchaser-seller relationship between proprietary handler and producer, and the principal-agent relationship between a co-operative and its members, which results in the "blending of the net proceeds" of the sales of the members' milk and "the distribution thereof" to the members.

The Government's brief states (p. 30) that a "co-operative is required to pay the minimum class prices fixed by the order". The statute is exactly to the contrary, since by Section 5c(F) a co-operative is entitled to blend "the net proceeds of all of its sales * * * and to make distribution thereof to its producers". That co-operatives are thus exempted from the minimum price as well as the uniform price regulations is recognized in the Government's point Ic. 4 (pp. 131-149).

The proviso at the end of Section 5c(F) that a co-operative shall not sell its members' milk to a handler "at prices less than the prices fixed pursuant to paragraph (A) of this subsection" (the minimum prices) demonsfrates that a co-operative is not required to return the minimum prices to its own members. If a co-operative is to sell its members' milk at the minimum prices it manifestly cannot deduct the expenses of marketing and

other operating expenses and still return the minimum prices to its producers.

The plain meaning of the statute is that a co-operative may sell directly to stores and to consumers, as this co-operative does, at prices which are unregulated or else may sell to handlers at the regulated minimum prices, and distribute the net proceeds of either type of sale among its members.

This co-operative is within the provisions of the Capper-Volstead Act, being engaged "in the co-operative marketing of agricultural products". 7 U. S. C., Section 453.

Under subdivision F of Section 8c(5) the co-operative may market its members' milk, blend "the net proceeds" and make "distribution thereof to its producers". It is impossible for this co-operative so to blend the net proceeds of its sales and make distribution thereof in accordance with its contract, if it is compelled, as here sought, to pay into the producer settlement fund the difference between the proceeds of its members' milk and its value calculated on the basis of the uniform prices. It would then no longer be blending the net proceeds of the sales and making distribution in accordance with its contract, but would be turning over to its members a portion of the net proceeds equal to the value of the milk at the uniform prices, and turning over the rest of the proceeds to a fund to be passed on to other producers.

The provision that a co-operative may distribute the net proceeds of its sales among its own producers necessarily excludes equalization of those proceeds with other producers selling milk to handlers or other vendees, for it would not then be making distribution to its producers of the "net proceeds of all of its sales".

This co-operative, in accord with accepted principles of modern co-operative marketing, does not purchase its members' milk or accept its members' milk at a fixed

guaranteed price, but acts as an agency operating at
t, through which its members pool their individual
rketing operations and the members in accord with
ir contract with the co-operative are entitled to the
l proceeds of their milk less expenses of marketing
x. 41 to stipulation of facts).

The language of subparagraph (F) as well as the other
rtions of Section 5c patently contemplate such type
co-operative marketing, and evidence the intent of
ngress to provide that co-operatives might if they chose
ntinue their characteristic method of marketing and
uld each distribute the net proceeds of the milk of
ir members among their own members.[1]

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[1] The Congressional intent is further evidenced by the remarks on the
r of the Senate in reference to the sections covering the fixing of prices
milk. The following appears at page 11139, Congressional Record, 74th
gress, 1st Session:

"SENATOR COPELAND: The amendment which we have before us pro-
es that a co-operative association shall not sell its milk or products to
handlers at prices less than those fixed. In New York State there are
great many co-operatives that sell their milk directly to consumers.
ere is nothing in the proposed amendments which provides that the co-
rative that sells milk and milk products directly to the consumer shall
rge itself with the prices fixed. If this condition shall be allowed to
st, it will be a short time only before the entire fluid market in every
will be taken away from the regular handlers of milk who are pur-
sing their supply directly from the producers, as they will be required
pay the prices set by the order. It is further contended that the co-
ratives, in the absence of a set resale price, and with the exemption I
e mentioned, would be able to sell milk at a lower figure, and return
their members the net proceeds of their sales, regardless of what they
y be.

A conference was held in Syracuse in February, 1934, as I remember.
e producers did not agree 'upon acceptance of the proposed program or
n any other plan of production adjustment' which included a processing

SENATOR MURPHY (of Iowa, in charge of milk sections of the bill for
Committee): Mr. President, if the Senator will pardon me, there is
processing tax in this provision. Furthermore, in the case of the par-
lar producers to whom the Senator refers, there is not any obligation
n them to come in under this provision at all. They are free to stay
If they do not wish to come in and have their condition bettered, and
roper price paid them for their milk, this is a matter of their election.
will not be imposed upon them."

The order fairly interpreted carries out the intent of Congress and under its provisions this co-operative is not obligated to make payments to the producer settlement fund.

The order provides that in calculating his net pool obligation each handler may "subtract pro rata out of each class the quantity of milk received from the handler's own farm" (Art. VI, Sec. 1[3]).

There is therefore no net pool obligation in respect of milk produced on a handler's own farm, such milk does not enter into the computation of the uniform price and is not subject to the uniform price or producer settlement fund provisions of the order (Art. VI, Sec. 2; Art. VII, Sec. 8).

This co-operative does not own the farms on which its members' milk is produced. The Government's brief (p. 40) erroneously states this appellee contends it owns the farms of its members. It makes no such claim and its answer (par. 11) admits it "owns and operates no farms" (R. p. 78). This appellee's contention that the order itself exempts it from payment to the producer settlement fund is based on the fact that it is only an organization of producers selling milk produced by themselves on their own farms, and utilizing the co-operative and its subsidiary companies solely as agents to market their milk. The Government's brief (p. 132) points out "co-operative associations * * * are composed of milk producers who have organized to handle and sell their own milk * * *". The members at all times are the principals and the true handlers in the co-operative enterprise in which they market their milk. The Government's brief points out in respect of producer members of co-operatives (p. 31) "they (the producers) are also participants in a handling enterprise". Even in the case of co-operatives which take title

to their members' milk the New York Courts have ruled that the relationship is not "the ordinary one of purchase and sale" but that the relation is "of a trust or fiduciary character" in which the co-operative deals with its member's property. *Rhodes* v. *Little Falls Dairy Co.*, 230 A. D. 571, affd. 256 N. Y. 559. The members of this appellee operate their own farms; their milk is received by the co-operative, shipped to New York City and sold on their behalf to retail stores and consumers through subsidiary companies, the stock of which is all owned by the co-operative; the net proceeds of the sales are distributed among the members (R. pp. 265-267).

The producers are the principals in the marketing of milk produced on their own farms, for the co-operative is a mere agent or conduit for the sale of the milk, the net proceeds of which are transmitted to the producer principals. The Government's brief thus points out (p. 145) members of co-operatives "are owners of the handling enterprise * * * more concerned with what they receive for the milk they produce and sell through the co-operative". And at page 170 the Government's brief points out "Co-operatives are owned by and composed of producers * * * the amount they ultimately receive is * * * the net income of the co-operative enterprise * * *". The situation is no different than that of an individual farmer selling his own milk except that a group of farmers have joined together to acquire facilities to distribute their milk in the New York market, which as a practical matter is the only market in which it can be sold. The producer members are the principals, and so the actual handlers, and handlers who are marketing milk produced on their own farms and so handlers whose milk is not within the net pool obligation or producer settlement fund provisions of the order.

That the order does not intend co-operatives which market milk as agents for their producers to be subject to the producer settlement fund is further shown by the failure of the order to subject co-operatives to the payment of either the uniform or the minimum prices. In accord with the act, Section 5c(F), the only requirement of the order is that handlers must pay the minimum prices to co-operatives (Art. IV, Sec. 1).

A handler's obligation to the producer settlement fund is the difference between his net pool obligation and an amount "obtained by multiplying the net pooled milk of such handler by the uniform price" (Art. VII, Sec. 8). A handler's net pool obligation is the value of the milk handled by him calculated at the minimum class prices (Art. VI, Sec. 1). A co-operative is under no obligation to pay its members either the minimum or the uniform price. It is a fair interpretation of the order that it is under no obligation to make payments to the settlement fund, for irrespective of anything else neither end of the equation by which the obligation to the settlement fund is measured is applicable to the transactions of the co-operative. The Government's brief (p. 27) points out "The effect of order No. 27 is to create a market-wide pool of milk so that each handler, in effect, purchases his milk at the class prices from a pool created by all producers". This arrangement does not apply to a co-operative which purchases no milk, and Congress did not intend that co-operatives should be included in such plan since it expressly authorized them to continue to blend "the net proceeds" of their sales and make "distribution thereof" to their producers.

The Government in a footnote at page 194 states this appellee "is a completely dealer-controlled co-operative". Whether the Government is attacking the bona fide nature of this co-operative or whether it is merely asserting that

some dealer participated in its organization is not clear. No claim that this appellee is in any wise not a bona fide co-operative organized and operating for the benefit of its producer members is asserted in the complaint or has at any time been asserted in this case and there is no such issue in the case. The footnote on the last page of appellant's brief is the first intimation of any such claim.

This co-operative was organized in 1934 some years prior to the statute and order involved herein and could not possibly have been organized by reason of or in contemplation thereof.

Just what the Government means by the term "dealer-controlled" is not clear. No claim is made that this appellee does not operate along the same lines and with the same relations existing between itself and its members as co-operatives in general. Nor is any claim made that its members do not secure the net profits of the sales of their milk. That such is so is a stipulated fact (R. pp. 266, 267; Ex. 41 to stipulation of facts, R. p. 644).

The letter referred to by the Government for its assertion, Exhibit 23ii, to the stipulation of facts is a letter written by the intervening plaintiff bargaining agency and is manifestly in the nature of a self-serving declaration. Furthermore, the exhibit was not offered by this appellee, but by the other appellees and is in no wise binding upon it. The exhibit is under paragraph 58 of the stipulation of facts (R. p. 263) which paragraph relates to the defense raised by the other appellees that the order was secured through misleading publicity given out by the proponents of the order.

Moreover, if the exhibit was offered in evidence it apparently was so done through inadvertence. The stipulation of facts (R. p. 263) describes Exhibits 23aa to 23ii as "printed statements and radio broadcasts issued by the bargaining agency and its officers". The exhibit as

printed in the record does not fit this description for it has no possible bearing upon the issue of the misleading publicity and is a letter written by counsel for the bargaining agency.

Finally the exhibit itself demonstrates that this appellee is in fact a producer controlled co-operative. The exhibit refers to findings made by the New York State Division of Milk Control in August, 1934, a few months after the co-operative was organized. These findings in part state that the producers who are members of the co-operative "in addition to the risks of possible loss in producing milk which they have always taken, these producers are now assuming risks in its distribution in a market turned by fierce competition". Manifestly, if the producers have assumed the risk of loss it is because they are the actual entrepreneurs and principals in the enterprise who secure all profits made and, as the Division of Milk Control found, likewise take the risk of loss. That is exactly the nature of a true co-operative marketing organization.

As to the co-operative being a handler.

The Government urges this co-operative may not claim exemption from the settlement fund obligation, since by the definition of the order it is a handler (p. 194). The question is not whether the co-operative is a handler, but whether Congress intended to subject co-operatives to the equalization provisions of any order and whether this co-operative is such handler as comes within the exemption, which permits a handler to subtract from his net pool obligation the milk produced on his own farm.

That a person is a handler does not necessarily subject him to make payments to the fund. The order defines a handler as "any person who engages in the handling of

lk or cream therefrom, which was received at a plant proved by any health authority for the receiving of lk to be sold in the marketing area" (Art. I, Sec. 1[6]). nder that definition a truckman who received milk di- etly from some producer and trucked it on behalf of the oducer would be a handler, but no one would seriously im that such truckman was under obligation to make yments into the settlement fund. Likewise, a farmer ning a herd of several hundred cows who sells his milk rectly to consumers is a handler, but is under no obliga- n to make payments to the settlement fund as the milk produced on his own farm. In the same way the rmers who utilize this co-operative as agent to market eir milk are under no obligation to pay to the settlement nd. They are handlers, but they market milk produced their own farms.

Were these producers collectively to market their milk rough a commission agent, to whom commissions were id for his services, it would hardly be claimed that e agent was obligated to make payment to the producer ttlement fund, although he neither bought nor sold milk his own behalf.[2] It would be clear beyond question at the handlers within the meaning of the producer ttlement fund provision were the producers and not their ent. The present situation is the same, except that e producers instead of paying an agent to market their lk have organized a mutual agency through which they arket their milk without the need of paying commissions.

[2] The marketing of milk through such commission agents was once a stomary mode of distribution in New York. Report of New York Joint gislative Committee to Investigate the Milk Industry (N. Y. Legislative cument 1935, No. 114, p. 100).

POINT II

The provisions of the order in respect of payments to the producer settlement fund deprive the members of this co-operative of their property and deprive the co-operative and its members of the liberty of carrying on a lawful enterprise in the manner they desire, without due process of law in violation of the fifth amendment.

The order (Art. IV, Sec. 1) provides minimum prices for milk dependent upon its ultimate utilization. Handlers pay producers a uniform price which is a weighted average of the value of all milk covered by the order each month, figured on the basis of the applicable minimum prices (Arts. VI, VII, Sec. 1). Each handler has a monthly "net pool obligation" which, with adjustments, is the value of the milk purchased from producers calculated at the minimum prices (Art. VI, Sec. 1). A handler whose "net pool obligation" exceeds the amount he must pay producers at the uniform price is obligated to pay the excess to the producer settlement fund (Art. VII, Sec. 8). A handler whose "net pool obligation" is less than he must pay producers at the uniform price is entitled to receive the difference from the fund (Art. VII, Sec. 9).

To compel this co-operative to make payments to the producer settlement fund would take the property of its members without due process of law. This co-operative's members sell their milk directly to stores and consumers, sales unregulated by the order. The net proceeds of the sales of their milk exceed the amount they would receive if they received therefor a sum computed on the basis of the uniform prices. For September, 1938, this difference was over $5,000 (R. p. 367).

To compel the members of this co-operative to take a portion of the proceeds of their milk and through the device of the settlement fund to turn over such proceeds to other producers who have not had the same good fortune, business sense or diligence to acquire so lucrative a market would directly take their money and turn it over to other producers without compensation and without due process of law. One person's property may not thus be taken for another's private use. *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 350; *Chicago St. P. M. & O. Ry.* v. *Holmburg*, 282 U. S. 162, 167.

To compel the members of this co-operative to turn over part of the proceeds of their more lucrative market to other producers through the settlement fund would compel them to share their market with other producers. That may not constitutionally be done. *Thompson* v. *Cons. Gas Utilities Corporation*, 300 U. S. 55, 79, 80.

The purpose and effect of the statute and of the producer settlement fund avowedly is to compel producers having a more lucrative market to share the proceeds of their milk with producers who would otherwise receive less for their product.[1]

The question is squarely presented whether Congress may regulate an industry or industry in general in such manner as to compel the distribution of a prevalent "burden" among all participating in an industry and by legis-

[1] Bulletin D. M. —6 of August, 1938, issued by the Department of Agriculture, an explanation of the order (Ex. 9 at par. 13 of stipulated statement of facts), reads in this respect: "Purpose of the program * * * 2. Assure uniform returns to producers for milk sold in the marketing area regardless of the handler to whom the milk was sold, or the use made of the milk by the individual handler; 3. Assure each producer a fair share of the fluid milk market; and 4. Provide for the co[illegible] of surplus milk supplies so that the burden is borne fairly by all producers interested in the metropolitan market, and enable the use of surplus so that it will bring the highest return to producers."

Bulletin D. M. —8 of October, 1938, issued by the Department of Agriculture states that the order "enables each producer to obtain his fair portion of the benefits from the fluid-milk market and to bear his equitable share of the market's surplus milk burden."

lative fiat saddle with the "burden" those who by good fortune, good sense or diligence manage to avoid it.

If Congress may compel all in the milk industry to share the burden of a prevalent surplus, then it would seem that it likewise could compel all workers in interstate employment to share the burden of unemployment, a "burden" which prevails in industry even in prosperous times.[2]

The State legislatures would appear to have the same power in respect of intrastate employment. This would mean that a portion of the wages earned by workers who have employment could be taken from them against their will and distributed among those without work. It would also seem that workers who secure more for their labor in one section of the country than do other workers for the same labor in another section could be compelled to share their higher earnings with those whose remuneration is less. If the present statute is valid, the same legislative power of compelling the sharing of "burden" would appear to exist in respect of seasonal trades, in which there is always some period of the year when all workers in the trade do not secure work. Congress or a State legislature, dependent upon whether the industry is interstate or intrastate, could compel those who secure work for the entire year, due to good fortune, diligence or ability, to share, against their wishes, a part of what they earn during "off" seasons with workers in the trade who are not working during such seasons.

The Government's brief urges (p. 107) that if the classified use plan is adopted as here then some equalization plan is essential. This ignores that the price-fixing statute before this Court in *Nebbia* v. *New York*, 291 U. S. 502, was based on a classified use plan and contained no such

[2] Statistical Abstract of the United States 1937, U. S. Dept. of Commerce, pp. 317-324. Article on Unemployment Statistics by Isador Lubin, 22 Encyclopedia Brittanica (14th ed.), pp. 696, 697.

ovision although it dealt with the same milk shed as
ered by this order. The only claim advanced by the
pellant for the failure of the State law to function
perly was the inability of the State to regulate the
ce of milk received in New York from other States
22).

Moreover, different plants are maintained for the
cessing of fluid milk and the processing of various
es of manufactured products. The order by its "market
rvice" provisions recognizes this. At most it is a book-
eping detail to determine to which type of plant and
what utilization milk has been put. In plants where
lk is commingled for different uses it is likewise a
tter of bookkeeping detail to determine what percentage
milk goes into each use class, a method long used by
ndlers paying a "blended" price to producers and which
ust be done under the order (Art. VI). Producers
uld be paid a minimum price based upon a classified
e plan with the ultimate amount received dependent
on the use to which the handler to whom they sold
t the milk, without the need of any equalization plan
contained in this order. The equalization fund is an
cident not of the minimum class prices, but of the plan
hereby handlers pay each producer a uniform price,
respective of utilization (Government's brief, p. 27).

The argument, moreover, has no possible application
co-operatives such as this appellee, whose members
l their milk directly to stores and consumers and get
net proceeds of such sales, without their milk being
d to any handler.

The Government urges (p. 124) that the payments to
producer settlement fund deprive handlers of nothing.
is ignores that to compel payments into the equalization
ol by this appellee directly takes from its members,
ich it represents, a portion of the net proceeds of their

milk to be paid over to other producers. There could be no more direct taking of property.

The Government argues that "the equalization payments are essentially fair because they provide for a mutuality of burdens and benefits" (p. 126). This begs the question which is whether, consistent with due process, Congress can take a part of the property of one person and turn it over to another, so that one who has managed to avoid the "burden" prevailing in some industry may be forced to assume such "burden".

The contention is advanced (p. 124) that this appellee may not complain as the proceeds of its members' milk would not have been as great but for the order. This proposition is of no import. The sales of the milk of this appellee's members are not regulated by the order. Whether or not the price has risen since the order, it is an unregulated price. There is nothing to show these competitive prices have been raised by reason of the order. This is in no wise a case where a person has voluntarily sought advantages offered by the terms of some law and afterward tries to attack its validity. Irrespective of the price at which the milk is sold, it is an unregulated price, and to compel the members to pay over a portion of the proceeds of those sales to other producers is to take their property.

To compel this appellee to make payment to the producer settlement fund would invalidly interfere with the liberty of making lawful contracts between it and its members.

The producer settlement fund is a means of obligating all handlers to pay no more and no less than the uniform price to producers (Government's brief, p. 27). To compel this appellee to make payments into the fund is to

compel its members and it to carry on business as if it were purchasing their milk.

The co-operative does not purchase its members' milk, but markets it as agent for them, as sanctioned by the Co-operative Corporations Law of New York. This mode of marketing has long been encouraged by the Federal and State authorities.

To compel the co-operative and its members to operate as if the co-operative purchased its members' milk, although its members desire to market their milk without any sale to the co-operative, is an arbitrary interference with the right of the co-operative and its members to conduct their business in the lawful manner in which they desire to conduct it and an arbitrary interference with their liberty to make lawful contracts contrary to the Fifth Amendment. *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253, 261.

The equalization fund is not a regulation of interstate commerce.

The order and the statute are valid only if a regulation of interstate commerce. The power to fix prices of merchandise handled in interstate commerce may be assumed for the argument. But, to compel some producers to share the receipts of their milk with other producers has no possible relation to the regulation of interstate commerce and "the commerce power is as much dependent upon the type of regulation as its subject matter". *Virginian Ry. Co.* v. *System Federation*, No. 40, 300 U. S. 515, 557.

The cases relied upon by the Government do not sustain the equalization scheme.

New England Divisions Case, 261 U. S. 184, and *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, involved

statutes providing for a division of the income of railroads so that each received a fair return. The statutes were sustained as valid upon the proposition (*Dayton-Goose Creek Ry.* case, p. 481) that a person investing in a public utility is entitled to at least and no more than a "fair and reasonable profit".

The present case is much different. No one has yet suggested that a farmer engaged in the producing and selling of milk is engaged in a public utility and this Court in *Nebbia* v. *New York,* 291 U. S. 502, ruled to the contrary; nor is there anything in the present statute or order guaranteeing a fair return and no more to any milk producer or handler.

Mountain Timber Co. v. *Washington,* 243 U. S. 219, and *New York Central Railroad Co.* v. *White,* 243 U. S. 188, were workmen's compensation cases compelling employers to contribute to a common insurance fund. *Noble State Bank* v. *Haskell,* 219 U. S. 104, and *Abie State Bank* v. *Bryan,* 282 U. S. 765, involved common funds for the insurance of deposits in banks. In those cases, every person contributing to the funds received a benefit commensurate with his contribution, namely, an amount of insurance equivalent to the amount paid into the fund. Furthermore, payments into such insurance funds are operating costs which may be passed on to the general public. There is nothing like that in the present situation where the fund directly takes a portion of the proceeds of the sales of the milk of the members of this cooperative and turns them over to other producers who have a less lucrative market for their milk.

POINT III

The statute invalidly delegates to producers the legislative power of Congress.

The statute is not self-operative. The Secretary of griculture issues orders to carry the act into effect. ec. 8c[1]). Orders like that herein are to be effective ly after a designated percentage of milk producers prove them. When 50% of the handlers in the market- g area sign a marketing agreement regulating the ndling of milk in the same way as a proposed order, e order nevertheless is not effective unless approved a designated percentage of producers (Sec. 8c[8]). oreover, even though more than 50% of the handlers fuse to enter into marketing agreements, any proposed der necessarily becomes effective if approved by the signated percentage of producers and if the Secretary, th the approval of the President, determines the refusal handlers to sign the marketing agreement, tends to event the effectuation of the policy of the statute and at the order is the only practical means of advancing e interests of the producers (Sec. 8c[9]).

The act provides for a referendum to aid the Secretary ascertaining the producers' desires (Sec. 8c[19]). The der was issued upon the basis of such referendum (R. 253).

Under the act, the Secretary merely submits a proposal the producers for their approval. The event which ves the proposal the effect of law is approval by the ecessary percentage of producers, whether ascertained referendum or otherwise.[1]

[1] In a pamphlet distributed by the Department of Agriculture prior to e referendum (Ex. 8 at par. 13 of stipulated statement of facts) the following appears: "5. Q. What is necessary before the Federal-State pro-

Such delegation to private persons of the power to decide that a certain proposal shall become law so as to be binding, as in this case, upon all producers and handlers of milk is an invalid delegation of legislative power.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, this Court said, holding invalid a statute which permitted a majority of those engaged in an industry to adopt codes binding upon all in the industry (p. 311):

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form."

Mr. Chief Justice HUGHES, in his concurring opinion, stated (p. 318):

> "The provision permits a group of producers and employees, according to their own views of expediency, to make rules as to hours and wages for other producers and employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose."

See also: *Schechter* v. *U. S.*, 295 U. S. 495, 537; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116.

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gram can go into effect? A. Most important is the fact that producers must vote their approval of the plan. * * * Both the Federal and State orders must receive the required producer approval before the program as a whole can go into effect."

In another pamphlet issued by the Department (Ex. 9 at par. 13 of the stipulation of facts) the following appears: "Whether the Federal-State program for regulating the handling of milk in the New York metropolitan marketing area goes into effect, rests largely with the producers themselves. The decision of the producers whose votes are expressed in the referendum to be held will indicate whether dairymen favor the issuance of the order and will determine whether it will be possible to put the order into actual operation."

The codes in the *Carter* case were not prepared by Government officials, but by mine operators and workers. The factual difference that the order in this case was submitted by the Secretary to the producers for their requisite approval is of no legal consequence. The terms submitted to the producers were without validity and of no force until approved by the requisite percentage. The proposal submitted was a nullity of no more consequence than if prepared by a private person. It was the approval of the producers which made a nullity into law, binding upon all in the industry, and so the vote of the producers which was the effectual legislative act which determined whether a mere proposal should become law.[2]

The grave danger of permitting a portion of those engaged in an industry to determine "according to their own views of expediency" what shall be binding law for all in the industry is demonstrated by the figures of the referendum. Of 60,220 qualified producers, 45,644 votes were cast. 7,017 votes were rejected as invalid. Of the 38,627 votes counted, 33,663 votes were for and 4,964 against the proposed order (R. pp. 253, 261). The intervening plaintiff, the League, voted for its members and cast 22,287 votes (R. p. 152; Minutes, pp. 360, 361).

The League makes collective sales as agent for its producers (R. p. 262), and is in competition with this cooperative. The figures show that while the League may not have been able to compel the adoption of an order, its voting strength was such as to prevent the adoption of any order it did not desire. As the Court below pointed out (R. p. 757):

> "So great was the power and voting strength of the Dairymen's League, that no order which it

[2] The proposed order was submitted by the Secretary but its terms were prepared not by the Secretary or any government official, but by the intervening plaintiff bargaining agency. (R. p. 253, Exs. 58, 59, A-3).

opposed could be approved, for it controlled more than one-third of the entire number of producers entitled to vote."

The proposed order, as the Court below found, was actively sponsored by the League which initiated the program leading to its adoption (R. pp. 152, 153). It is an order which fits in exactly with the method by which the League was carrying on its operations so as to give to the League various competitive advantages over other handlers, as the Court found (R. pp. 135-139).[3]

By delegating to the producers the determination of whether certain proposals should become law competitors of this co-operative were given the power of determining how the milk industry should be conducted in this area. As was to be expected, those competitors sponsored and by their vote compelled the adoption of an order which gave them as many advantages as possible.

The decision of this Court in *Currin* v. *Wallace*, 83 L. Ed. 413, does not overrule the principle of the *Carter* case. That case sustained the validity of the Federal Tobacco Inspection Act, 49 Stat. 731-735. The act empowered the Secretary of Agriculture to establish standards for tobacco and to designate auction markets where tobacco moved in interstate commerce. Before designating any market, the Secretary was to determine by referendum the desire of tobacco growers who sold tobacco on such market. No market was to be designated unless two-thirds of the growers voting favored it. Nothing in the statute required a designation, however, though two-thirds of the growers did express their approval.

The difference between the Tobacco Act and the present act is vital. The approval of the tobacco

[3] The Court's findings are amply sustained by the proof (R. pp. 263, 264, 330, 331, 332, 334, 357, 373, 374, 742, Exs. 11, 12, 13, 46, 54, 81, 82, Exs. 21, 23, 24, 23-K, 23-L, 23-M to stipulated facts).

growers was purely advisory since, irrespective of their approval, the Secretary was not bound to designate any auction market as subject to the statute. Quite to the contrary the proposal submitted to the producers "shall become effective" when the requisite percentage vote in favor thereof (Sec. 8c[9]).

In the *Currin* case this Court pointed out: "This is not a case where a group of producers may make the law and force it upon a minority." That is exactly this case, for here the approval of the requisite percentage of producers may and did "make the law" which became binding on all in the industry. The Government argues (p. 118) that since it was not necessary to hold a referendum, and the Secretary might have ascertained the approval of the requisite percentage of producers in another way, there was no unlawful delegation. That is besides the point. The Secretary did choose the referendum method. What is important is not the method chosen to ascertain the producers' wishes, but that their approval, no matter how ascertained, was the act given the quality of changing a mere nullity into binding law.

The Government cites *Cusack Co.* v. *City of Chicago*, 242 U. S. 526. In the *Cusack* case, this Court had before it an ordinance which prohibited the erection of billboards on certain blocks but permitted the prohibition to be modified with the consent of the property owners on any block. This Court ruled that a property owner upon such block could not complain as to the provision permitting the modification of the ordinance by the consent of the property owners as he could not be injured thereby but could only be helped by acquiring a greater use of his property than he would have had but for the provision permitting the modification of the ordinance.

The present statute is vitally different, for here the manner in which this appellee may conduct its business is left to the determination of other producers who are its direct competitors and who are thus enabled to and in this case did adopt an order favorable to themselves.

POINT IV

The statute invalidly delegates the legislative power of Congress to the Secretary of Agriculture.

The statute delegates powers to the Secretary of Agriculture in respect of agricultural products similar to those granted to the President under the National Industrial Recovery Act. The Secretary is empowered to fix minimum prices to be paid to producers for milk and provide for the equalization in one of various ways of prices paid by all handlers to all producers.

The only guide is that the order to be issued shall "tend to effectuate the declared policy" of the act, Section 8c(3), namely, to raise the purchasing power of agricultural products to their pre-war level, Section 2(1), while likewise protecting "the interest of the consumer" by approaching the desired level of prices "at as a rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets", Section 2(2).

Under Section 8c(18): "Whenever the Secretary finds * * * that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period * * * are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk * * * he shall fix such

prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest."

The statute contains no definite standard to which the power delegated to the Secretary must conform and the attempted delegation is invalid. *Schechter* v. *U. S.*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

POINT V

The statute and the order, by regulating the prices to be paid for an agricultural commodity, regulate a matter of local concern beyond the powers of Congress.

The statute and order have for their purpose the creation of higher prices for agricultural commodities (Sec. 2). The order does not regulate the movement of milk in interstate commerce. The sole element regulated is the price to be paid to producers for milk sold in the marketing area upon the theory that such milk comes into the area by way of interstate commerce or competes with milk that has so come into the area. The order seeks to give producers a higher price than they would receive through the operation of supply and demand. If Congress may regulate by providing for a higher price, then it manifestly could regulate by providing a maximum price which producers could charge and, by raising and decreasing the price level, bring about increases or decreases in the volume of production.

The only thing here regulated is the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant. The regulated transaction is fully completed before any interstate commerce begins, just as the transactions sought to be regulated in *Schechter* v.

U. S., 295 U. S. 495, 543, commenced only after interstate commerce had fully terminated.

The prices which a dairy farmer may receive for his milk have no more relation to the flow of interstate commerce than had the hours and wages received by the employees of the slaughter house in the *Schechter* case. In that case the Court said at pages 548-549:

> "The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce."

The Government (pp. 95-101) relies on cases such as *Tagg Bros.* v. *United States*, 280 U. S. 420; *Board of Trade* v. *Olsen*, 262 U. S. 1; *Currin* v. *Wallace*, and *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50. To regulate rates and practices, in stock yards, grain exchanges, tobacco auction markets or grain warehouses, which are conduits through which pass commodities being handled in interstate commerce, is a true regulation of the movement of interstate commerce, and not at all like the regulation in this case, which is like that in the *Schechter* case.

If Congress may regulate the prices which a dairy farmer may charge for his product, because it is subsequently shipped in interstate commerce or competes with milk so shipped, it would appear equally in the power of

Congress to regulate all details respecting the production of such milk and so take from each community or State the power of controlling the sanitary conditions under which its milk supply is to be produced. Likewise Congress would seem free to fix the wages which a dairy farmer must pay his hired hands.

It is one thing for Congress to regulate the labor relations existing between a vast multitude of small farmers each of whom may employ at the most one or two hands[1] and an altogether different proposition to regulate an industry such as was before the Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, an organization which was operated "on a national scale" so that its "relation to interstate commerce (was) the dominant factor" in its activities (p. 41). The Court in that case pointed out (p. 37):

> "Undoubtedly the scope of this power (to regulate interstate commerce) must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

In *Schechter* v. *U. S.*, 295 U. S. 495, 554, Mr. Justice CARDOZO, in his concurring opinion, said:

> "I find no authority in that grant (the power to regulate interstate commerce) for the regulation of wages and hours of labor in the intrastate transactions that make up the defendant's business."

The regulation here does exactly that which this Court ruled may not be done, for it regulates the minute trans-

[1] Statistical Abstract of the United States, 1937, U. S. Dept. of Commerce, p. 55, shows that in 1930 there were 6,012,012 farmers, and 2,732,972 paid farm laborers.

actions of a multitude of small dairy producers, transactions fully completed before interstate commerce commences.

The regulation of prices at which a dairy farmer sells his product was recently held by this Court to be a matter of local concern, even though his milk was delivered to a plant, all of the receipts of which were shipped into another state for consumption. *Milk Control Board* v. *Eisenberg Farms*, 83 L. Ed. 495, decided Feb. 27, 1939.[2]

In *United States* v. *Butler*, 297 U. S. 1, this Court, condemning as invalid portions of the Agricultural Adjustment Administration Act, which the present act supersedes, said:

> "It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government."

The present statute and order, under the pretext of regulating interstate commerce, fix the prices to be paid producers for milk, which is an exercise of the power to control the production of milk, a matter purely of local concern, by raising or lowering prices. Nothing in the statute or order in any way seeks to regulate the movement of milk in interstate commerce. Just as Congress may not need the guise of its taxing power to regulate a matter of local concern, so it is denied that power under the guise of regulating commerce. *Hammer* v. *Dagenhart*, 247 U. S. 231.

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[2] There is no warrant for the fear expressed in the Government's brief (pp. 103-105) that unless the Federal Government regulates the price of milk sold to be shipped into another State, the price must remain unregulated. The decision in *Baldwin* v. *Seelig*, 294 U. S. 511, is no basis for such assumption. That case decided New York could not set up what was in effect a tariff barrier against the products of other States and not that a State might not regulate prices of milk sold by its producers in such State because such milk was to be ultimately shipped to another State for utilization. The *Eisenberg Farms* case sustains such power in the State.

POINT VI

The Secretary of Agriculture improperly permitted co-operatives to vote for their members without first ascertaining their wishes.

The statute provides (Sec. 8c[19]):

> "For the purpose of ascertaining whether the issuance of an order is approved or favored by producers * * * the Secretary may conduct a referendum among producers."

Under Section 8c(12) the Secretary is to

> "Consider the approval or disapproval by any cooperative association * * * as the approval or disapproval of the producers who are members of * * * such cooperative association."

The referendum is to be conducted to ascertain "whether the issuance of an order is approved or favored by producers" and it is fair to assume that Congress intended the officers of any co-operative to ascertain the wishes of its members before casting their votes. In this case, one co-operative, the intervening plaintiff, the League, cast sufficient votes to control the referendum. A chronology of events makes clear that the League's officers cast its votes without first ascertaining the viewpoint of its members.

On July 8, 1938, letters were sent to the co-operatives operating in the milkshed advising them of the steps requisite to qualify them to vote for their members, and requiring them to have certain information in the hands of the Secretary at Washington not later than July 16, 1936 (R. pp. 250, 450-453). As the Court below pointed out (R. p. 758) this left four days for the co-operatives, after

necessary time for the transmission of mail from and back to the Secretary.

On August 15, 1938, the acting Secretary directed the referendum agent to notify the co-operatives which had been ruled qualified to vote of such determination and to instruct them to canvass the sentiment of their producers before exercising the privilege of voting for them (stipulation of facts, par. 23, R. p. 255).

The referendum was commenced on August 19, 1938. An organization such as the League manifestly could not and no proof was offered to show it did, within a period of four days, ascertain the wishes of the 22,287 producers for whom it voted, in respect of a novel and complex regulatory scheme.

The referendum, so far as the intervening plaintiff, the League, is concerned, represents merely the opinion of a handful of officers and not the approval of the 22,287 producers whose votes they cast and without whose votes no order could have been adopted.[1]

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[1] Counsel for this appellee is advised that the brief on behalf of the other appellees will discuss the proof showing the referendum was conducted after the sending of literature by the Government and proponents of the order, which misstated the contents of the order. As a result the producers did not appreciate the nature of the proposed order on which they were voting so that there was no basis for the Secretary finding that the order was approved by two-thirds of the producers voting. The Court so found (R. pp. 148, 149, 150). The finding is amply supported by the proof (Ex. 66, Exs. 8, 9, 22, 23, 23-A to 23-H, 24, 24-A to 24-D, 26-E to 26-L of stipulated facts)

Appellant's brief treats this issue (pp. 182-187) as if it rested upon the claim that proponents of the order with fraudulent motive sought by false representations to mislead producers as to the nature of the order, and the argument is made that no inquiry may be had into the motives of the Government officials or of the proponents of the order. The proof in this respect was not offered in any wise to attack the motives of the Government officials, nor was there any claim of fraud, in the sense in which that term is used in the common law action of deceit. The proposed order was so complex that it is fair to assume it could not be understood by most producers. This is demonstrated by the necessity of sending "explanations" of the order to the producers. The "explanations" did not correctly state the terms of the order and it is fair to infer that the producers voted for or against such "order" as was described in the "explanations". It follows that the approval indicated by the referendum was an approval not of Order No. 27 but of the "order" as described in the "explanations". From this it also follows that there was no factual basis for the Secretary finding that the order was approved by two-thirds of the producers as that finding was based on the referendum.

POINT VII

The statute does not authorize the market service provisions of the order.

The order, Article VII, Section 6, provides so-called "market service" payments. These are (1) payments from the producer settlement fund to handlers who receive milk at plants equipped only for the receiving and shipping of milk who during any month except October, November and December move such milk to a plant where it is made into a manufactured dairy product, and (2) payments made in respect of milk received at a plant equipped for condensing or drying milk, which during November and December is sold in the marketing area as Class I (fluid) milk.

The second of these service payments is available only to handlers who operate plants equipped for condensing or drying milk. In actual practice both service payments become available by reason of inter-plant shipments made by a handler which has both manufacturing plants and fluid milk plants. In at least one instance (R. pp. 345, 346, Exs. 24, 24A) the handler became entitled to such "market service" payments by shifting milk back and forth between two plants which were within one city block of each other.

This appellee operates no manufacturing plants and is not in a position to seek the second of the market service payments (R. pp. 144, 266).

The statute, Section 8c(5)(7), sets forth all the terms which may be included in an order regulating the marketing of milk. The provision for market service payments is not within or incidental to any of such terms.

To sustain the market service payment provisions appellant relies on Section 8c(5)(Bii) of the act (p. 158)

authorizing the establishment of a uniform price to be paid to producers subject to "a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or all handlers, among producers * * * on the basis of their marketings of milk during a representative period of time". The section does not sustain the market service payments. Those payments have no relation to the price paid to producers and do not enter into the calculation of the uniform price. The section authorizes the fixing of a uniform price and enumerates adjustments to which such price may be subject.

This co-operative is not equipped to receive the second of the market service payments. It is directly injured by the unauthorized provision in the order, for if it be subject to the settlement fund provision, then a portion of the proceeds of its members' milk is taken without statutory authority and turned over to competitors of this co-operative and its members.

POINT VIII

The order improperly seeks to utilize the power of Congress to regulate interstate commence so as to protect an industry in one area of the United States from the competition of the same industry in other areas of the United States.

The primary problem of the milk industry in the New York milk shed has been the production of a surplus over the requirements of the population. *Nebbia* v. *New York* 291 U. S. 502, 517. This surplus must be utilized for manufactured products which compete with dairy products produced in other areas of the country where costs of production are lower.

The order fixes the prices to be paid producers for milk which is to be utilized for manufactured products at such levels as to enable handlers who are manufacturers to compete with manufactured dairy products produced in other areas. The pamphlet of the Department of Agriculture (DM-8 at p. 10) issued October, 1938, reads in this respect: "These prices are set up so as to enable the manufacturer of products made from these lower classes of milk to compete without undue advantage or disadvantage with the same products made from milk not qualified for the New York market." (See also appellant's brief, p. 19.)

The proof also is that the market service payments provided by the order enable handlers to utilize milk produced in the New York shed for manufacturing purposes when otherwise milk or cream for such purposes would be purchased from some western source (R. p. 355).

The order thus protects the manufacturer in the New York area from the competition of manufactured products produced in other areas of the country. The statute does not authorize an order with such regulatory provisions. The aim of the act is to raise the level of milk and other agricultural prices, not the protection of handlers in one section of the country against competition from handlers in other sections.

Congress, moreover, has not been granted the power to protect persons engaged in industry in one portion of the country against the legitimate competition of those engaged in the same industry in another section of the country where production costs may be lower. The attempt of the Secretary so to do is in no sense a legitimate regulation of interstate commerce. At best it is an attempt to exercise a power not granted to Congress under the pretext of regulating interstate com-

merce and this may not be done for "it is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted". *United States* v. *Butler*, 297 U. S. 1, 68.

POINT IX

Equitable relief was properly denied to enforce an order which was prepared by and enacted as a result of the efforts of one group of handlers, the intervening League and bargaining agency, and which order was designed to give to such handlers advantages over their competitors including this co-operative. The order moreover invalidly discriminates in favor of such handlers.

The Court below found: (A) The order was issued as a result of the program of the intervening plaintiff, the League, which had sufficient votes to control the referendum. (B) The League sponsored the order and the bargaining agency submitted the order to the Secretary. (C) The League and the bargaining agency carried on a coercive campaign to compel handlers to acquiesce in the order. (D) The bargaining agency and the League conspired to convert the provisions of the statute into instruments of coercion, restraint of trade and monopoly and in furtherance of such conspiracy procured the issuance of the order (R. pp. 150, 151, 153).

The order grants substantial payments to organizations which move milk between fluid and manufacturing plants exactly as they did prior to the order as part of their normal operations (R. p. 352).

The order does not regulate the prices to be paid for milk sold outside the marketing area. Such milk is paid for at prices reached by agreement between producer and handler and need not be accounted for under the order.[1]

The order fits in with the manner in which the League carried on and carries on its business and, as the Court below found, results in great competitive advantages to the League (R. pp. 135-139). Whether the League in putting through its program committed any technical violation of anti-monopoly statutes or any other technically illegal act is of no particular moment. The important element is that it prepared and by its efforts caused the adoption of an order which gave to it advantages which others would not have under the order. The only fair inference to be drawn is that it was acting to secure and secured an order drawn not for the benefit of producers in general but for its own benefit.

In short, the order sought to be enforced was conceived, prepared and put into effect as a result of the program of and the vote of the intervening plaintiff, the League, acting at times through the intervening plaintiff, the bargaining agency, which by means of the order gained discriminatory advantages over its competitors.[2]

The order thus gives substantial advantages to a group of producers in the same class as this defendant, but who sell outside as well as inside the marketing area and

[1] It is of some significance that Order No. 4 regulating the marketing of milk in the Boston area does regulate the out-of-market sales and requires handlers to account therefor under the order (Order No. 4, Article IV).

[2] Counsel for this appellee has been advised that the facts upon which the findings of the Court below, referred to herein, were based will be fully discussed in the brief of the other appellees who raised this issue. For this reason they are not here discussed. The proof amply sustains the findings of the Court (R. pp. 263, 264, 276, 277, 278, 284, 288, 334, 365, 369, 370, 374, 375, 378, 379, 396, Exs. 11, 12, 13, 46, 54, 59, 60, 61, 67, 67-A, 67-B, 77, 81, 82, Exs. 21, 23, 23-H, 24, 24-A to 24-E of stipulated facts).

who also manufacture milk. Manifestly it is the larger co-operatives as contrasted to smaller organizations such as this co-operative that are able to deal in various markets and to maintain both manufacturing and fluid milk plants (cf. appellant's brief, p. 52). To differentiate between persons in the same class so as to give added advantages to those with the greater resources would seem a discriminatory, unreasonable and arbitrary classification and so a denial of due process to those discriminated against. *Lepper* v. *Texas*, 139 U. S. 462.

The Government argues appellees have no standing to attack the reasonableness of the order's terms without first petitioning the Secretary of Agriculture to modify the order (p. 172). This argument has no application to this appellee: (1) It claims to be exempt from the order and could not consistently seek any relief thereunder. (2) It does not attack the order on the basis of unreasonableness but on the claim the order is not in accord with the act and is unconstitutional in its entirety. (3) It attacked the constitutionality of the act itself, a question which could not possibly be heard by the Secretary. (4) It sought no judicial relief of any kind and so is not within the rule that resort may not be had to the Courts for judicial relief until all available administrative remedies are exhausted.

Under the circumstances, it would in any event be contrary to good equity to grant equitable relief. The granting of the injunctive relief sought would serve to further the plan worked out and put into effect by one group of producers for their own benefit, so that the Court properly withheld equitable relief, which is always a matter of discretion. *Di Giovanni* v. *Camden Fire Insurance Co.*, 296 U. S. 64, 73.

POINT X

The order must be deemed never to have become effective in view of the invalidity of the state order to which it was intended to be complementary.

The statute, Section 10(i), authorizes the Secretary "to confer with and hold joint meetings with the duly constituted authorities of any State" and to issue orders "complementary to orders or other regulations issued by such authorities".

The order was voted on in the referendum as an order to be complementary to a State order regulating the marketing of milk in the marketing area and was issued by the Secretary, to be effective as such complementary order.

The order itself shows that it was preceded by hearings conducted jointly by the Secretary of Agriculture and the authorities of the State of New York. Article X conditions the effectiveness of the order upon the existence of the State order to which it is intended to be complementary, and reads that: "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary."

The literature sent to producers prior to the referendum likewise makes clear that the proposal on which the producers voted was a proposed joint "Federal-State Program" (Exs. 8, 9 at par. 13 of stipulation of facts).

On February 21, 1939, after the trial herein, the State order to which the Federal order was intended to be complementary was held invalid, *Noyes* v. *Erie & Wyoming Farmers Co-operative Corp.*, 170 Misc. 42. Advance

Sheets, March 11, 1939, a decision of the New York S preme Court, Special Term, Albany County. Since th decision the State order has been suspended.

The Federal order was voted upon and issued upo the basis of being complementary to an existing Sta order, and as there is no State order, unless the decisio of the Special Term be reversed, it follows that th Federal order either never became effective or else mu be deemed to have terminated with the invalidation o the State order.

CONCLUSION

The decree appealed from should be affirmed.

Respectfully submitted,

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